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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 1154

BANQUE DE FRANCE,

Appellant,

vs.

THE SUPREME COURT OF THE STATE OF NEW YORK, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK.

APPELLANT'S BRIEF IN SUPPORT OF ITS JURISDICTIONAL STATEMENT AND IN OPPOSITION TO STATEMENT OPPOSING JURISDICTION.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 1154

IN THE MATTER OF THE APPLICATION OF

BANQUE DE FRANCE,

Petitioner-Appellant,

For an Order of Restraint

against

THE SUPREME COURT OF THE STATE OF NEW YORK, HON. FELIX C. BENVENGA, INDIVIDUALLY AND AS ONE OF THE JUSTICES THEREOF, AND DANIEL DE GORTER AND HENRI WILD, AS ASSIGNEES OF BANQUE NATIONALE DE BELGIQUE,

Respondents-Appellees.

BRIEF OF APPELLANT IN SUPPORT OF ITS JURISDICTIONAL STATEMENT AND IN OPPOSITION TO APPELLEES' STATEMENT AGAINST JURISDICTION.

Appellees' objections herein to the jurisdiction of this Court upon appeal, as well as to the granting of certiorari, do not lend themselves readily to simple analysis. How-

ever, we believe that the statement of the two following points fairly embraces all of appellees' objections in both respects:

1. That the question here presented is not one as to the validity of the New York statute, but is a frivolous non-Federal question as to whether or not the New York statute has been misapplied to the particular facts in this case.

2. That the question presented is of no public importance or interest, and its determination by this Court will not establish the rights of other litigants.

We shall reply to these objections in order.

I.

Appellees concede that the State statute which is involved in this proceeding is Section 224 of the General Corporation Law of the State of New York (Section 224, L. 1909, ch. 28), which provides:

> "An action against a foreign corporation may be maintained by a resident of the state, or by a domestic corporation, for any cause of action." (Appellees' statement, p. 2.)

Independently of any concession by appellant, however, it is clear that the decision of the Court of Appeals of the State of New York herein held that section of the General Corporation Law to be valid against our contention that, in its application to the situation at bar, the statute violates the Commerce Clause of the United States Constitution, Article 1, Section 8, Clause 3 thereof. In this regard, the opinion herein of Chief Judge Lehman of the New York Court of Appeals states:

> "The Appellate Division, upon motion of the respondents, dismissed the petition of Banque de France 'as matter of law and not in the exercise of discretion.'

> The petitioner seeks an extraordinary remedy to halt threatened action by a court or judge which the petitioner contends would be a usurpation of power. The General Corporation Law (Cons. Laws, ch. 23) provides that 'an action against a foreign corporation may be maintained by a resident of the state, or by a domestic corporation, for any cause of action.' (Sec. 224)."
>
> • • • • • • •
>
> "At least in theory, state laws which unreasonably obstruct and unduly burden interstate commerce in any form may violate the commerce clause of the Constitution. (*Davis v. Farmers Cooperative Equity Co.*, 262 U. S. 312, 316.) The principle upon which the petitioner relies is general; yest when that principle is invoked to support the contention that in a particular case a law of the State of New York is obnoxious to the commerce clause of the Constitution, then the nature of the function which the foreign corporation performs in foreign or interstate commerce may be the decisive factor in applying the test whether the assertion of jurisdiction casts a 'serious and unreasonable burden' upon the corporation, a burden which unduly obstructs interstate commerce."
>
> (Transcript of Record, pp. 158, 159-160.)

Based apparently upon this statement of the determining test by the Court of Appeals, appellees urge that the question here involved is one merely as to the misapplication of the New York statute, and does not involve a decision as to the validity of the statute. They then urge that such a question of misapplication can only be reviewed by this Court upon petition for a writ of certiorari and not upon appeal, because they say that the jurisdiction of this Court upon appeal cannot be predicated upon a claim that a State statute as applied to a particular appellant, or to particular facts, is unconstitutional.

The decision of the Court of Appeals in this case necessarily determined that Section 224 of the General Corpora-

tion Law of the State of New York is valid, over appellant's objection of unconstitutionality, as applied to this appellant and to the facts in this case.

The jurisdiction of the Supreme Court of the State of New York over foreign corporations is wholly statutory, and except for the provisions of Section 224 of the General Corporation Law, the Court would have no jurisdiction of the action which appellant, by this Special Proceeding, seeks to restrain. *Gregonis* v. *P. & R. Coal and Iron Co.*, 235 N. Y. 152, 158.

Nor is the question one of the interpretation or construction of Section 224 of the General Corporation Law of the State of New York, which is all-embracing in its application to actions by residents of the State against foreign corporations, including carriers engaged in interstate commerce, as to which it has been held to be unconstitutional under the Commerce Clause in *Baltimore Mail S. S. Co.* v. *Fawcett*, 269 N. Y. 379; *N. Y. Brook, etc.* v. *Aluminum Co.*, 231 A. D. (N. Y.) 693; and *Ball* v. *Canadian Pacific Steamships, Ltd.*, 6 N. Y. Supp. (2d) 877, affirmed 276 N. Y. 650.

Consequently, it is clear that the determination in this proceeding by the Court of Appeals that the courts of the State of New York have jurisdiction over this appellant necessarily involves the determination that Section 224 of the General Corporation Law is valid against appellant's claim of its unconstitutionality.

The only problem, therefore, is to ascertain the soundness of appellees' contention that jurisdiction of this Court upon appeal cannot be founded

> "• • • upon a claim that a State statute as applied to a particular appellant, or to particular facts, is unconstitutional, • • •" (Appellees' Statement, p. 3).

In the majaority opinion in *Dahnke-Walker Co.* v. *Bondurant*, 257 U. S. 282, upon the dissenting opinion in which appellees rely, the governing rule is thus stated:

> "In the state court the plaintiff did not simply claim a right or immunity under the Constitution of the United States, but distinctly insisted that as to the transaction in question the Kentucky statute was void, and therefore unenforceable, because in conflict with the commerce clause of the Constitution. The court did not accede to the insistence, but applied and enforced the statute. Of course, that was an affirmation of its validity when so applied. *Bridge Proprietors v. Hoboken Co.*, 1 Wall. 116, 144; *McCullough v. Virginia*, 172 U. S. 102, 116-117; *General Oil Co. v. Crain*, 209 U. S. 211, 228; *Corn Products Refining Co. v. Eddy*, 249 U. S. 427, 432. And see *Western Union Telegraph Co.* v. *Kansas*, 216 U. S. 1, 3, 27. The case is therefore of the class described in the first of the provisions which we have quoted from the jurisdictional section. That the statute was not claimed to be invalid *in toto* and for every purpose does not matter. A statute may be invalid as applied to one state of facts and yet valid as applied to another. *Poindexter v. Greenhow*, 114 U. S. 270, 295; *St. Louis, Iron Mountain & Southern Ry. Co. v. Wynne*, 224 U. S. 354; *Kansas City Southern Ry. Co. v. Anderson*, 233 U. S. 325. Besides, a litigant can be heard to question a statute's validity only when and so far as it is being or is about to be applied to his disadvantage. *Yazoo & Mississippi Valley R. R. Co. v. Jackson Vinegar Co.*, 226 U. S. 217; *Jeffrey Manufacturing Co. v. Blagg*, 235 U. S. 571, 576. Neither does it matter on what ground the court upheld and enforced the statute. The provisions quoted from the jurisdictional section show that in cases where the validity of a state statute is drawn in question because of alleged repugnance to the Constitution the mode of review depends on the way in which the state court resolves the question. If it be resolved in favor of the validity of the statute the review may be

> on a writ of error; and if it be resolved against the validity the review can only be on writ of certiorari. The provisions take no account of the particular grounds or reasons on which the decision is put." (pp. 288-289.)

That rule has been frequently since restated by this Court, in decisions in which Mr. Justice Brandeis concurred, so that it must be concluded either that his dissent in the *Dahnke-Walker* case was founded upon a different principle or that he subsequently found himself to be in concurrence with the majority opinion in that case.

In *Fiske* v. *Kansas*, 274 U. S. 380, in a unanimous opinion of this Court, the rule is thus restated:

> "A decision of a state court applying and enforcing a state statute of general scope against a particular transaction as to which there was a distinct and timely insistence that, if so applied, the statute was void under the Federal Constitution, necessarily affirms the validity of the statute as so applied, and the judgment is, therefore, reviewable by writ of error under § 237 of the Judicial Code. *Dahnke-Walker Co. v. Bondurant*, 257 U. S. 282, 288. The inquiry then is whether the statute is constitutional as applied and enforced in respect of the situation presented. *Ward & Gow v. Krinsky*, 259 U. S. 503, 510; *Cudahy Co. v. Parramore*, 263 U. S. 418, 422. And see *St. Louis, &c., Railway v. Wayne*, 224 U. S. 354, 359." (p. 385.)

Also, in *Cudahy Co.* v. *Parramore*, 263 U. S. 418, this Court held:

> "Defendants in error have submitted a motion to dismiss the writ of error on the ground that no federal question is involved, but it is clearly without substance, and is overruled.
>
> That the statute is constitutional upon its face is established by previous decisions of this Court *(New York Central R. R. Co. v. White*, 243 U. S. 188; *Haw-*

kins v. Bleakly, Id. 210; *Mountain Timber Co. v. Washington,* Id. 219; *Arizona Employers' Liability Cases,* 250 U. S. 400; *Madera Co. v. Industrial Accident Commission,* 262 U. S. 499) and the only inquiry we need make is whether it is constitutional as applied and enforced in respect of the facts of the instant case. See *Dahnke-Walker Milling Co. v. Bondurant,* 257 U. S. 282, 288-289." (p. 422.)

Moreover, from the recent decision of this Court in *Memphis Natural Gas Co.* v. *Beeler,* No. 499, October Term, 1941, decided March 30, 1942, it is clear that this rule applies in a situation wherein the validity of the State statute was either drawn in question or passed upon in the state court, or was deemed by the highest court of the state to be in issue. Obviously, all of these requirements as to jurisdiction upon appeal have been met in the situation at bar.

In the face of these authorities, the appellees' suggestion that the appeal is frivolous requires no comment.

II.

Conceding, *arguendo,* that there is merit in appellees' contention that this Court lacks jurisdiction upon appeal herein, and that this Court should view the order of Chief Judge Lehman allowing this appeal merely in the light of a petition for a writ of certiorari, there is no merit in the suggestion of appellees that the questions here presented are of no public importance or interest, and that their determination by this Court will not establish the rights of other litigants.

The question here presented is one of first impression.

The doctrine as to the immunity of a foreign corporation from suit in a forum foreign to any place in which it does business and foreign to the place where the cause of action arose in favor of a non-resident of the forum, had its origin

in the decision of this Court in *Davis* v. *Farmers Cooperative Equity Co.*, 262 U. S. 312 (1923), and was founded upon the conclusion that, in such a situation, an undue burden was imposed upon interstate or foreign commerce in contravention of the Commerce Clause of the Constitution.

Concededly, this doctrine has been applied heretofore only in favor of foreign corporations engaged in interstate or foreign commerce as carriers, although there has been no refusal by this Court, or any Court prior to the decision of the New York Court of Appeals in this proceeding, to apply the doctrine to other foreign corporations upon the ground that they were not engaged in the transportation of passengers or goods in such commerce.

Appellant contends that the doctrine should be applied not only to foreign corporations engaged in commerce as carriers, but to all foreign corporations engaged in interstate or foreign commerce in any of its phases. This contention presents a question of law which has never been passed upon by this Court, and which can only be finally determined by this Court, as it involves a constitutional question.

The two tests apparently postulated by the decision of the Court of Appeals herein as to the applicability of this doctrine of immunity to a particular state of facts, namely (a) the nature of the function which the foreign corporation defendant performs in foreign or interstate commerce; and (b) the existence of another forum available equally to both parties, may or may not be accepted as controlling by this Court. In any event, they have not yet been so accepted. Consequently, the failure of this Court to pass upon those tests must necessarily leave an important constitutional principle involved in uncertainty.

Moreover, a clarification of the principles of immunity which shall be held ultimately to control in the case of corporate defendants engaged in interstate or foreign com-

merce must necessarily establish the rights of other litigants than appellant. Until there shall have been such a clarification by this Court, the rights of all litigants similarly situated will remain in doubt.

The action pending in the courts of New York, the further prosecution of which appellant seeks to restrain, is between the central banks of issue of Belgium and of France, and involves in excess of Two Hundred Twenty Eight Million Dollars. Appellees do not even pretend that the alleged assignment to them of the claim of Banque Nationale de Belgique was for any purpose other than an effort to give jurisdiction to the courts of the State of New York. Therefore, notwithstanding such alleged assignment, the real parties in interest to this litigation continue to be the central banks of issue of Belgium and of France.

The case of *Davis* v. *Farmers Cooperative Equity Co., supra,* was determined by this Court upon a writ of error. Numerous other decisions upon the question were made by this Court upon the granting of writs of certiorari, namely, *Denver Rio Grande R. R. Co.* v. *Terte,* 284 U. S. 284; *Atchison Railway Co.* v. *Wells,* 265 U. S. 101; *Michigan Central Railway Co.* v. *Dix,* 278 U. S. 492; and *International Milling Co.* v. *Columbia,* 292 U. S. 511. At least one of those cases could also have been brought to this Court upon direct appeal, that of *Atchison Railway Co.* v. *Wells, supra.*

We are not aware of any case in which this Court has refused to review a decision wherein the State Court had applied new tests, which this Court had not already laid down, for the determination of the existence of this constitutional immunity.

Conclusion.

We respectfully submit that the jurisdiction of this Court upon appeal in this proceeding is clear. If, however, this Court should be of the opinion that it does not have juris-

diction herein upon direct appeal, then we respectfully request the Court to regard and act upon the papers whereon the appeal was allowed, including the jurisdictional statement filed herein, as a petition for certiorari, pursuant to § 237 (c) Judicial Code, and that such petition be granted.

Respectfully submitted this 21st day of April, 1942.

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